100

FILED
JUL 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 07-1281

In the Supreme Court of the United States

DAVID KAY AND DOUGLAS MURPHY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the indictment—which petitioners did not challenge until after they were convicted at trial—adequately alleged that petitioners acted "willfully" in violating the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-1 *et seq.*

2. Whether the court of appeals, after concluding that the legislative history of the FCPA demonstrated Congress's intent to prohibit the type of bribes paid by petitioners, properly declined to apply the rule of lenity in construing the statute.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Bifulco v. *United States*, 447 U.S. 381 (1980) 14
Bryan v. *United States*, 524 U.S. 184 (1998) 7
Crandon v. *United States*, 494 U.S. 152 (1990) 15, 17
Holloway v. *United States*, 526 U.S. 1 (1999) 15
Hughey v. *United States*, 495 U.S. 411 (1990) 16
Ladner v. *United States*, 358 U.S. 169 (1958) 15
Moskal v. *United States*, 498 U.S. 103 (1990) 14
Muscarello v. *United States*, 524 U.S. 125 (1998) 14, 15
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 16
Reno v. *Koray*, 515 U.S. 50 (1995) 7, 15
Smith v. *United States*, 508 U.S. 223 (1993) 14
United States v. *Allen*, 406 F.3d 940 (8th Cir. 2005), cert. denied, 127 S. Ct. 826 (2006) 9
United States v. *Avery*, 295 F.3d 1158 (10th Cir.), cert. denied, 537 U.S. 1024 (2002) 10
United States v. *Childress*, 58 F.3d 693 (D.C. Cir. 1995), cert. denied, 516 U.S. 1098 (1996) 10
United States v. *Coleman*, 656 F.2d 509 (9th Cir. 1981) 12

Cases—Continued: Page

United States v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576 (6th Cir.), cert. denied, 537 U.S. 880 (2002) 9

United States v. *Corporan-Cuevas*, 244 F.3d 199 (1st Cir.), cert. denied, 534 U.S. 880 (2001) 9

United States v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999) 9, 11

United States v. *Gibson*, 409 F.3d 325 (6th Cir. 2005) ... 10

United States v. *Granderson*, 511 U.S. 39 (1994) 14

United States v. *Higgs*, 353 F.3d 281 (4th Cir. 2003) 9

United States v. *James*, 980 F.2d 1314 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993) 12

United States v. *Pheaster*, 544 F.2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) 12

United States v. *Prentiss*, 256 F.3d 971 (10th Cir. 2001) 9

United States v. *Previte*, 648 F.2d 73 (1st Cir. 1981) 10

United States v. *R.L.C.*, 503 U.S. 291 (1992) 14, 16

United States v. *Resendez-Ponce*, 549 U.S. 102 (2007) ... 9

United States v. *Robinson*, 367 F.3d 278 (5th Cir.), cert. denied, 543 U.S. 1005 (2004) 9

United States v. *Sabbeth*, 262 F.3d 207 (2d Cir. 2001) 10

United States v. *Spinner*, 180 F.3d 514 (3d Cir. 1999) 9, 12

United States v. *Trennell*, 290 F.3d 881 (7th Cir.), cert. denied, 537 U.S. 1014 (2002) 9

United States v. *Vitillo*, 490 F.3d 314 (3d Cir. 2007) 12

United States v. *Vogt*, 910 F.2d 1184 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991) 10

Cases—Continued: Page

United States v. *Wander*, 601 F.2d 1251 (3d Cir. 1979) 12
United States v. *Watkins*, 709 F.2d 475 (7th Cir. 1983) 10
United States v. *Wells*, 519 U.S. 482 (1997) 15
United States v. *White*, 241 F.3d 1015 (8th Cir. 2001) ... 10

Statutes:

Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-1 *et seq.*:
15 U.S.C. 78dd-1 4
15 U.S.C. 78dd-1(a) 2, 4
15 U.S.C. 78dd-1(a)(1) 3, 13
15 U.S.C. 78dd-1(b) 5, 14
15 U.S.C. 78dd-1(c) 5
15 U.S.C. 78dd-1(f)(3) 14
15 U.S.C. 78dd-2(a) 2
15 U.S.C. 78ff(a) 4
15 U.S.C. 78ff(c)(2)(A) 4
18 U.S.C. 371 ..... 2, 4
18 U.S.C. 1505 2

Miscellaneous:

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. (1988) ... 6
Webster's Third New International Dictionary of the English Language (1993) 13

In the Supreme Court of the United States

No. 07-1281

DAVID KAY AND DOUGLAS MURPHY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-52a, 53a-108a) are reported at 513 F.3d 432 and 359 F.3d 738, respectively. The opinion of the district court (Pet. App. 109a-121a) is reported at 200 F. Supp. 2d 681.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. A petition for rehearing was denied on January 10, 2008 (Pet. App. 122a-130a). The petition for a writ of certiorari was filed on April 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were each convicted on 12 counts of paying bribes to

foreign officials, in violation of the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-1(a) and 78dd-2(a); and one count of conspiring to do so, in violation of 18 U.S.C. 371. Murphy was also convicted of obstructing a proceeding before the Securities and Exchange Commission (SEC), in violation of 18 U.S.C. 1505. Kay was sentenced to 37 months of imprisonment, to be followed by two years of supervised release. Pet. App. 131a-148a. Murphy was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. *Id.* at 149a-165a.

1. Petitioners were officers of American Rice, Inc. (ARI), a publicly-traded company based in Houston that processes and sells rice throughout the world. Murphy was the president and chief executive officer, and Kay was a vice president who reported directly to Murphy. Pet. App. 2a; Gov't C.A. Br. 4.

In the 1990s, ARI opened a rice processing plant in Haiti, and it formed the Rice Corporation of Haiti (RCH) to operate the plant. ARI shipped rice in bulk from Texas to Haiti, where the rice was processed and bagged for distribution. The Republic of Haiti required rice importers to pay substantial customs duties and taxes on their rice shipments and sales. Pet. App. 2a; Gov't C.A. Br. 4-6. Petitioners became concerned that the required payments put ARI at a competitive disadvantage relative to smugglers who evaded the payments and competitors who bribed customs officials to accept reduced payments. Gov't C.A. Br. 7-9; see Pet. App. 8a & n.14.

In January 1998, petitioners decided to reduce ARI's payments by under-invoicing the amount of rice in their shipments and bribing Ha tian customs officials to accept the false documents. They directed ARI employees

to prepare two sets of documents for each shipment: one for internal use that accurately reflected the amount of rice, and another for presentation to customs officials that under-declared the amount by up to 50%. Petitioners authorized RCH employees to pay bribes to the customs officials to accept the false invoices. Gov't C.A. Br. 9-11. Between January 1998 and August 1999, petitioners authorized the use of false documents and the payment of bribes in connection with 12 shipments of rice. For those shipments, ARI under-declared 29,987 metric tons of rice valued at over $7.7 million, resulting in a total gross savings of over $1.5 million and a total net savings (after the payment of the bribes) of over $1 million. *Id.* at 11-12.

In October 1999, Murphy was fired by ARI. In 2001, he testified under oath in connection with an investigation by the SEC. During his testimony, Murphy lied about his knowledge of the false shipping documents and his involvement in the bribes paid to Haitian officials. Gov't C.A. Br. 13-14.

2. A grand jury in the Southern District of Texas returned an indictment charging petitioners with 12 counts of violating the FCPA, which prohibits publicly traded companies and their officers from making "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" a bribe to a foreign official for purposes of influencing the official's actions "in order to assist [the company] in obtaining or retaining business for or with * * * any person." 15 U.S.C. 78dd-1(a)(1). Pet. App. 110a. Under 15 U.S.C.

78ff(c)(2)(A), an officer who "willfully" violates the FCPA is subject to criminal penalties.[1]

Petitioners moved to dismiss the indictment. They argued that the payment of bribes to foreign officials to reduce customs duties and taxes did not satisfy the so-called "business nexus" element of the FCPA, *i.e.*, that the bribes "assist * * * in obtaining or retaining business." 15 U.S.C. 78dd-1(a). Petitioners claimed that the business nexus element limited the scope of the FCPA to bribes paid to secure new business or to retain existing business. Pet. App. 113a. The district court agreed and dismissed the indictment. *Id.* at 109a-121a.

3. The court of appeals reversed. Pet. App. 53a-108a. It concluded that "bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription" when "the bribery was intended to produce an effect—here, tax savings—that would 'assist in obtaining or retaining business.'" *Id.* at 89a-90a.

The court of appeals agreed with the district court that the "obtain[] or retain[] business" language was ambiguous. Pet. App. 62a, 67a. But after examining legislative history, *id.* at 67a-87a, the court concluded that Congress did not intend "to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts," *id.* at 88a.

When the FCPA was enacted in 1977, the court of appeals noted, the initial House bill contained no limit-

---

[1] Petitioners incorrectly cite 15 U.S.C. 78ff(a) for the proposition that the FCPA criminalizes only "willful" violations. Pet. 2, 7, 9, 12, 13. But that provision applies to "[a]ny person who willfully violates any provision of this chapter (*other than* section 78dd-1 of this title)" (emphasis added). An individual who willfully violates Section 78dd-1 is subject to criminal penalties under 15 U.S.C. 78ff(c)(2)(A).

ing "business nexus" element, but Congress adopted the Senate's proposal to include such an element. Pet. App. 68a-70a. That proposal was based on an SEC Report that had identified four types of illegal payments, including payments "made with the intent to assist the company in obtaining or retaining government contracts." *Id.* at 71a (internal quotation marks omitted). The court concluded "that, in using the word 'business' when it easily could have used the phraseology of [the] SEC Report, Congress intended for the statute to apply to bribes beyond the narrow band of payments sufficient only to 'obtain or retain government contracts.'" *Id.* at 73a.

The court of appeals found additional support for its conclusion in the 1988 amendments to the FCPA, which added an explicit statutory exception for payments "to expedite or to secure the performance of a routine governmental action," 15 U.S.C. 78dd-1(b), as well as an affirmative defense for payments that were legal in the country in which they were offered or that constituted bona fide expenditures directly related to the promotion of products or services or the execution or performance of a contract, see 15 U.S.C. 78dd-1(c). Those amendments, the court reasoned, "illustrate[d] an intention by Congress to identify very limited exceptions to the kinds of bribes to which the FCPA does not apply." Pet. App. 77a. In addition, the court noted that, in rejecting a proposed amendment to the language of the business nexus element, the Conference Committee stated that the statute was "not limited to the renewal of contracts or other business, but also include[d] a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, *such as a payment to a foreign official for the purpose*

of obtaining more favorable tax treatment." *Id.* at 79a (quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 918 (1988)).

4. On remand, the grand jury returned a second superseding indictment. With respect to the 12 counts charging both petitioners with violating the FCPA, the indictment added allegations that petitioners "believed that if American Rice Inc. and Rice Corporation of Haiti were required to pay the full amount of duties and taxes that should have been paid on the imported rice they would not have been able to sell the rice at a competitive price, would have lost sales to competitors, and would not have realized an operating profit, thus putting at risk American Rice Inc.'s and Rice Corporation of Haiti's business operations in Haiti." C.A. R.E. Tab 3, at 3. The indictment also added a count charging both petitioners with conspiring to violate the FCPA and a count charging petitioner Murphy with obstructing justice by making false statements in his testimony in the SEC proceeding. *Id.* at 7-14.

After a trial, a jury found both petitioners guilty on all counts. More than five months later, petitioners moved to dismiss the FCPA counts, arguing, for the first time, that the indictment failed to allege that petitioners acted "willfully." The district court denied the motion, C.A. R.E. Tab 11, and proceeded to impose sentence, Pet. App. 131a-148a, 149a-165a.

5. The court of appeals affirmed. Pet. App. 1a-52a. The court rejected petitioners' claim that the FCPA failed to give fair notice that their conduct was illegal. *Id.* at 5a-18a. The court held that the business nexus element of the statute was not vague, explaining that "[i]mprecise general language in one of seven requirements for a bribery conviction under the FCPA does not

draw a line so vague that [petitioners] were not reasonably aware of their potential for engaging in illegal activity under the FCPA when they made payments to Haitian officials to reduce tax and duty burdens through misrepresentations." *Id.* at 7a-8a. And the court concluded that the FCPA was not sufficiently ambiguous to merit application of the rule of lenity. *Id.* at 15a-18a. It observed that the rule of lenity "only applies in situations of ambiguity more extreme than here, where, 'after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.'" *Id.* at 15a-16a (brackets in original) (quoting *Reno* v. *Koray*, 515 U.S. 50, 65 (1995)). In the case of the FCPA, the court concluded, the legislative history resolved any textual ambiguity because it "show[ed] that Congress meant to prohibit a range of payments wider than those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements." *Id.* at 17a-18a (internal quotation marks omitted).

The court of appeals also held that the indictment sufficiently alleged the "willfully" element of a criminal FCPA violation. Pet. App. 29a-31a. The court noted that the indictment "omitted the term 'willful,'" but concluded that "this omission was harmless error at most, as the language of the indictment described the exact type of conduct required for a finding of willfulness." *Id.* at 30a. The court observed that "criminal willfulness requires only that criminal defendants have knowledge that they are acting unlawfully or 'knowledge of the facts that constitute the offense,' depending on the definition followed." *Ibid.* (quoting *Bryan* v. *United States*, 524 U.S. 184, 193 (1998)). Referring to its earlier discussion of the jury instructions—which, the court of appeals

had held, properly required the jury to find willfulness in the sense that "a defendant knew that he was doing something generally 'unlawful' at the time of his action, *id.* at 27a—the court concluded that the "corruptly" language in the indictment "sufficiently charge[d] an intentional act." *Id.* at 30a (internal quotation marks omitted). The court also noted that other language in the indictment "sufficiently alleged the element of willfulness by using language that directly asserted [petitioner's] knowing commission of acts that are unlawful generally and unlawful under the FCPA." *Id.* at 31a.

ARGUMENT

Petitioners contend (Pet. 11-17) that the failure of the indictment to include an element of the offense can never be harmless error. Although that issue has divided the courts of appeals and warrants this Court's review in an appropriate case, this case does not properly present that issue because petitioners failed to challenge the indictment until after they were found guilty at trial. Petitioners also argue (Pet. 17-30) that the rule of lenity precludes the application of the FCPA to their conduct. The court of appeals correctly stated the rule of lenity and determined that its application in this case was unwarranted. The court's interpretation of the FCPA does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners suggest (Pet. 11-17) that this Court should grant review to decide whether the omission of an element of an offense from an indictment can constitute harmless error. As petitioners note (Pet. 11-12), this Court recently granted review to decide that question, but it ultimately resolved the case by finding that

the indictment contained all of the elements of the offense and thus presented no harmless-error issue. See *United States* v. *Resendez-Ponce*, 549 U.S. 102 (2007). The pre-*Resendez-Ponce* split continues to exist. The majority of the courts of appeals have held that such an omission (or the omission of a sentence-enhancing fact) is subject to harmless-error analysis. See *United States* v. *Allen*, 406 F.3d 940, 943-945 (8th Cir. 2005) (en banc), cert. denied, 127 S. Ct. 826 (2006); *United States* v. *Robinson*, 367 F.3d 278, 285-286 (5th Cir.), cert. denied, 543 U.S. 1005 (2004); *United States* v. *Higgs*, 353 F.3d 281, 304-307 (4th Cir. 2003); *United States* v. *Trennell*, 290 F.3d 881, 889-890 (7th Cir.), cert. denied, 537 U.S. 1014 (2002); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); *United States* v. *Prentiss*, 256 F.3d 971, 981-985 (10th Cir. 2001) (en banc); *United States* v. *Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001). The Third and Ninth Circuits, on the other hand, have held that such omissions constitute structural error and require reversal. See *United States* v. *Spinner*, 180 F.3d 514, 515-516 (3d Cir. 1999); *United States* v. *Du Bo*, 186 F.3d 1177, 1179-1181 (9th Cir. 1999).

Contrary to petitioners' contention (Pet. 12-13), however, this case is not a suitable, much less an "ideal," vehicle for resolving the question. Petitioners argue (Pet. 12) that the FCPA counts of the indictment were deficient because they failed to allege that petitioners acted "willfully." But unlike the defendant in *Resendiz-Ponce*, see U.S. Br. at 3, *Resendiz-Ponce*, *supra* (No. 05-998), petitioners did not challenge the sufficiency of the indictment until several months after the jury returned its verdicts. The consequence of petitioners' failure to

raise their challenge before trial is that the indictment must be read liberally in favor of its sufficiency, and, under that standard, the indictment is sufficient to withstand petitioners' challenge. Thus, this case, like *Resendez-Ponce*, is not an appropriate vehicle for resolution of the harmless-error issue.

The courts of appeals agree that "[t]he scrutiny given to an indictment depends, in part, on the timing of a defendant's objection to that indictment," and an indictment challenged after the completion of the government's case should be construed "in a liberal manner" in favor of sufficiency. *United States* v. *Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001). Thus, "[w]here a defendant first challenges 'the absence of an element of the offense' after a jury verdict," the indictment is "sufficient unless it is so defective that by any reasonable construction, it fails to charge the offense for which the defendant is convicted." *United States* v. *Avery*, 295 F.3d 1158, 1174 (10th Cir.), cert. denied, 537 U.S. 1024 (2002). See *United States* v. *Gibson*, 409 F.3d 325, 331 (6th Cir. 2005); *United States* v. *White*, 241 F.3d 1015, 1021 (8th Cir. 2001); *United States* v. *Childress*, 58 F.3d 693, 720 (D.C. Cir. 1995), cert. denied, 516 U.S. 1098 (1996); *United States* v. *Vogt*, 910 F.2d 1184, 1201 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); *United States* v. *Watkins*, 709 F.2d 475, 478 (7th Cir. 1983); *United States* v. *Previte*, 648 F.2d 73, 80 (1st Cir. 1981).

The decision below is fully consistent with that settled rule. As the court of appeals explained, the omission of the term "willfully" in the FCPA counts of the indictment was "harmless error at most, as the language of the indictment described the exact type of conduct required for a finding of willfulness." Pet. App. 30a. The court observed that although the indictment did not

use the word "willfully," its factual allegations described quintessentially dishonest conduct, *i.e.*, that petitioners created false shipping documents and bribed Haitian officials to accept them, thereby cheating the Haitian government out of customs duties and sales taxes. *Id.* at 30a-31a. That is not the type of conduct that an ordinary person believes is lawful. Coupled with the indictment's additional allegation that petitioners acted "corruptly," the facts alleged in the indictment sufficiently charged the willfulness element of an FCPA violation under the liberal standard that applies to a post-trial challenge to the sufficiency of an indictment.[2]

Contrary to petitioners' contention (Pet. 12-13), the result in this case would not have been different had the case arisen in the Ninth Circuit. Although the Ninth Circuit held in *Du Bo* that "failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis," 186 F.3d at 1179, the court expressly noted that its holding was "limited to cases where a defendant's challenge is time-

---

[2] Petitioners assert (Pet. 9-10, 14 n.3) that the court of appeals held that the indictment sufficiently alleged willfulness only in the sense that the defendants acted knowingly, not in the sense that the defendants knew they were committing unlawful acts. But after explaining that "the language of the indictment described the exact type of conduct required for a finding of willfulness," the court observed that, "[a]s we discussed in detail in the context of jury instructions, criminal willfulness requires only that criminal defendants have knowledge that they are acting unlawfully or 'knowledge of the facts that constitute the offense,' depending on the definition followed." Pet. App. 30a (citation omitted). And the court had earlier concluded that the jury instructions were sufficient because they captured *both* of those definitions of willfulness. *Id.* at 22a-27a. Thus, the opinion indicates that the court evaluated the sufficiency of the indictment under both definitions of willfulness. *Id.* at 30a-31a.

ly," *id.* at 1180 n.3. The court acknowledged that "[u]ntimely challenges to the sufficiency of an indictment are reviewed under a more liberal standard." *Ibid.*; see *United States* v. *James*, 980 F.2d 1314, 1317 (9th Cir. 1992) ("When the sufficiency of the indictment is challenged after trial, it is only required that 'the necessary facts appear in *any form* or *by fair construction* can be found within the terms of the indictment.'"), cert. denied, 510 U.S. 838 (1993); *United States* v. *Coleman*, 656 F.2d 509, 510 (9th Cir. 1981) ("[W]e believe the indictment must be liberally construed because [the defendant] failed to raise any objection to it until after trial.").

Nor would the result have been different had this case arisen in the Third Circuit. Although that court has stated that the "[f]ailure of an indictment sufficiently to state an offense is a fundamental defect . . . and it can be raised at any time," *Spinner*, 180 F.3d at 516 (brackets in original) (quoting *United States* v. *Wander*, 601 F.2d 1251, 1259 (3d Cir. 1979)), it has also recognized that "indictments which are tardily challenged are liberally constructed in favor of validity," *Wander*, 601 F.2d at 1259 (quoting *United States* v. *Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977)). See *United States* v. *Vitillo*, 490 F.3d 314, 324 (3d Cir. 2007).

Because the indictment sufficiently alleged the willfulness element of an FCPA violation under the liberal-construction standard that governs a post-trial challenge to the sufficiency of an indictment, the question whether the omission of an element of an offense from an indictment can constitute harmless error is not presented in this case. Petitioners' claim therefore does not warrant this Court's review.

2. Petitioners also argue (Pet. 17-34) that the court of appeals erred in holding that the business nexus element of the FCPA is not limited to bribes paid to foreign officials to acquire or retain contracts but also reaches bribes paid to secure reduced customs duties and taxes when the resulting savings benefit the company's existing business. The court below is the first court of appeals to consider the interpretation of the business nexus element, and petitioners do not suggest that its decision conflicts with any decision of any other court or appeals. Instead, petitioners object that the court of appeals did not properly apply the rule of lenity. That claim lacks merit. More to the point, in the absence of any conflict in the construction of a particular statute, the alleged misapplication of a properly stated principle of statutory interpretation does not warrant this Court's review.

According to petitioners, the rule of lenity applies because the business nexus element is ambiguous. Petitioners are incorrect, because the plain language of the business nexus element, when read in the context of the entire statute, is not ambiguous. The business nexus element requires that a bribe to a foreign official be made "in order to assist [the company] in obtaining or retaining business for or with * * * any person." 15 U.S.C. 78dd-1(a)(1). The word "business" is ordinarily understood to mean a "commercial or mercantile activity customarily engaged in as a means of livelihood." *Webster's Third New International Dictionary of the English Language* 302 (1993). Thus, the statutory language does not restrict the FCPA's coverage to the award or renewal of contracts, but more broadly reaches actions that assist in obtaining or retaining business. Moreover, the FCPA carves out an exception from its prohibition

for payments for "routine governmental action." 15 U.S.C. 78dd-1(b); see also 15 U.S.C. 78dd-1(f)(3) (defining "routine governmental action"). That exception would be superfluous if the statute were limited in the manner that petitioners propose. Because the plain language of the FCPA covers petitioners' conduct, the rule of lenity has no application here.

To the extent that the statutory text might be said to be ambiguous (see Pet. App. 6a, 12a), any ambiguity can be resolved by the evolution and legislative context of the law. As this Court has made clear, the rule of lenity applies only in "situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980)); see *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); *United States* v. *R.L.C.*, 503 U.S. 291, 305-306 (1992) (plurality opinion). And, as the court of appeals noted, the rule is not triggered by the mere fact that the statutory language may be "amenable to more than one reasonable interpretation." Pet. App. 12a, 67a; see *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). Instead, it "is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 508 U.S. 223, 239 (1993) (brackets in original) (internal quotation marks omitted).[3]

---

[3] Petitioners suggest (Pet. 31) that "the Court should use this case to decide whether legislative history is *ever* a sufficient basis to construe an otherwise ambiguous criminal statute expansively against a defendant." That issue is not properly presented in this case, because petitioners did not raise it below on either appeal; the court of appeals

Petitioners are therefore incorrect when they assert (Pet. 17-18) that "the question of how much statutory ambiguity is required" to trigger application of the rule of lenity is "plainly unsettled." As petitioners note (Pet. 20-21), this Court stated in *Ladner* v. *United States*, 358 U.S. 169, 178 (1958), that the "policy of lenity means that the Court will not interpret a federal criminal statute [more harshly] * * * when such an interpretation can be based on no more than a guess as to what Congress intended." Although petitioners postulate (Pet. 21) that "that formulation plainly was not intended to be taken literally," this Court has repeatedly held, relying on *Ladner*, that the rule of lenity applies only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation marks omitted); see *Holloway* v. *United States*, 526 U.S. 1, 12 n.14 (1999); *United States* v. *Wells*, 519 U.S. 482, 499 (1997); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995).[4]

---

did not address it; and, as discussed, the text and structure of the statute alone preclude petitioners' proposed interpretation.

[4] Contrary to petitioners' contention (Pet. 25), the court of appeals did not hold "that lenity applies only when all the available tools of statutory construction leave the court entirely at sea regarding the statute's meaning." Rather, the court simply observed that "[t]he rule only applies in situations of ambiguity more extreme than here, where 'after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.'" Pet. App. 15a-16a (second pair of brackets in original) (quoting *Koray*, 515 U.S. at 65). Nor are petitioners correct when they assert that the court of appeals "frankly acknowledged" that, "even *after* considering the legislative history, 'the business nexus standard is ambiguous.'" Pet. 31 (quoting Pet. App. 6a); see *id.* at 8. In fact, the court held that the leg-

There is no merit to petitioners' claim (Pet. 18-19, 26) that the court of appeals' decision is at odds with this Court's decisions in *Crandon* v. *United States*, 494 U.S. 152 (1990); *Hughey* v. *United States*, 495 U.S. 411 (1990); and *Ratzlaf* v. *United States*, 510 U.S. 135 (1994). Contrary to petitioners' reading, none of those cases held "that because the legislative history did not establish that the Government's interpretation was *clearly correct*, lenity compelled reading the statute to favor the defendant." Pet. 26. Indeed, none of the decisions directly turned on the application of the rule of lenity. Rather, they held that legislative history cannot enlarge the scope of a statute beyond its terms where the plain language is *not* ambiguous. See *Crandon*, 494 U.S. at 160; *Hughey*, 495 U.S. at 422; *Ratzlaf*, 510 U.S. at 147 n.17. Those decisions are not relevant here, because the court of appeals did not rely on legislative history to adopt a construction of the statute broader than its plain language. Rather, the court relied on legislative history to support a construction that was "within the fair meaning of the statutory language," which the court considered to be ambiguous.[5] *R.L.C.*, 503 U.S. at 306 n.6; see Pet. App. 67a. And because the statutory language itself was broad enough to support the meaning demonstrated by the legislative history, petitioners were not deprived of fair warning that their conduct was unlawful. See *id.* at 11a.

Petitioners' disagreement with the court of appeals' reading of the legislative history does not warrant fur-

---

islative history of the FCPA clarified any ambiguity in the statutory language. See Pet. App. 17a-18a, 75a.

[5] As noted above, the government does not consider the language to be ambiguous, and no other court of appeals has examined the question.

ther review. See Pet. 27-31. Petitioners assert that "the Government's position receives merely weak support from the legislative history," Pet. 30, and that "[t]he central sources of legislative history * * * are either silent * * * or favor petitioners," Pet. 30-31, but the court of appeals held to the contrary after a thorough review. Pet. App. 67a-90a; see *id.* at 4a (noting prior decision's "rigorous analysis of the FCPA and its legislative history"). Petitioners suggest (Pet. 34) that this case provides an opportunity for the Court to resolve the scope of the FCPA's "obtaining or retaining business" element, but that is not even a question expressly posed by the petition (Pet. i), and the court of appeals' interpretation of the FCPA does not conflict with any decision of any other court of appeals. Instead, petitioners have limited their question presented (Pet. i) to the applicability of the rule of lenity, and that abstract question does not warrant review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

JULY 2008